

## Domestic Relations: The Uniform Child Custody Jurisdiction Act

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# THE UNIFORM CHILD CUSTODY JURISDICTION ACT

DAVID L. WALTHER\*

The Uniform Child Custody Jurisdiction Act was approved and recommended by the National Conference of Commissioners on Uniform State Laws on August 1, 1968. If enacted in Wisconsin, the Uniform Act would profoundly change the basis for the exercise of child custody jurisdiction.

## WISCONSIN CASE LAW

The Wisconsin Supreme Court has recognized three bases for jurisdiction over the custody of children. In *Greef v. Greef*<sup>1</sup> and *Zillmer v. Zillmer*<sup>2</sup> the Supreme Court relied upon a tentative draft of the Restatement, Conflict of Laws,<sup>3</sup> which provided as bases for jurisdiction the following:

1. Domicile of the child within the state.
2. Physical presence of the child within the state.
3. Personal jurisdiction over the parties contending for custody.

In *Greef v. Greef* the Wisconsin Court noted:

... the theory of jurisdiction based on domicile is founded on the proposition that custody is a question of status, but that the protection of the child where physically present and the interests of those (normally the parents) who are disputing among themselves for the child's custody are important considerations.<sup>4</sup>

The Court then continued, quoting from the proposed comments of the Restatement section:

"On the other hand, no unanimity exists as to which of these bases should have this exclusive position. In point of fact, each one provides a reasonable and suitable basis upon which a court may proceed in a proper case. The state in which the child is physically present must have power to take the necessary steps for his protection; that which has personal jurisdiction over those competing for the custody provides a convenient forum in which to try the issue; and lastly that of the child's domicile should also have jurisdiction because it will normally have the greatest concern with his welfare. ... As a result there will be situations where three states have concurrent judicial jurisdiction, namely, the state of the child's domicile, that where he is physically

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<sup>1</sup> 6 Wis. 2d 269, 94 N.W.2d 625 (1959).

<sup>2</sup> 8 Wis. 2d 657, 100 N.W.2d 564 (1960).

<sup>3</sup> Section 117, Tentative Draft 1, Restatement 2d, Conflict of Laws (1953). This section was subsequently withdrawn.

<sup>4</sup> 6 Wis. 2d at 276, 94 N.W. 2d at 629.

present at the time of suit, and that which has personal jurisdiction over those (normally the parents) who are competing for his custody."<sup>5</sup>

In *Brazy v. Brazy*<sup>6</sup> a fourth basis of jurisdiction was recognized. *Brazy* held that a Wisconsin court had jurisdiction to modify the custody provisions of a divorce judgment rendered in Wisconsin. The Court stated:

We are of the opinion that plaintiff's objection that the Wisconsin court could not act because of lack of personal jurisdiction over her was not well taken. She was plaintiff in the original action. The divorce judgment made it evident in a number of provisions that the rights of the parties would be subject to possible further orders of the court. Sec. 247.25, Stats., provided for subsequent alterations of the judgment concerning care, custody, maintenance, and education of the children. Notice to her of the application for modification need not be delivered to her within Wisconsin.<sup>7</sup>

The Court, however, held that even though a Wisconsin court had jurisdiction to act, it should have declined to do so, inasmuch as an action in a California court, covering the same subject matter, was pending. The Court then stated:

The orderly administration of justice requires that there be some rule for avoiding the conflicting exercise of jurisdiction by two courts both of which are competent to decide the issues. Ordinarily, a court should not exercise jurisdiction over subject matter over which another court of competent jurisdiction has commenced to exercise it.<sup>8</sup>

This concept, applied by the Wisconsin court to avoid conflicting jurisdiction, is incorporated into the Uniform Act along with procedural devices to insure that such a conflict will not arise.

In *Anderson v. Anderson*<sup>9</sup> the Court reaffirmed that a Wisconsin court has jurisdiction at any time to modify the provisions of a Wisconsin divorce judgment relating to the custody of the minor children of the parties.

Thus, under Wisconsin case law as it existed prior to the most recent statutory provisions, there were actually four bases upon which child custody jurisdiction could be predicated: domicile, physical presence, personal jurisdiction over the parents, and jurisdiction based on modification of a prior judgment.

It is thus theoretically possible, under Wisconsin case law, for four states to have concurrent jurisdiction over the question of a child's custody, and to render four conflicting custody decrees.

<sup>5</sup> *Id.* at 276-277, 94 N.W.2d at 629.

<sup>6</sup> 5 Wis. 2d 352, 92 N.W.2d 738 (1958).

<sup>7</sup> *Id.* at 361-362, 92 N.W. at 743.

<sup>8</sup> *Id.* at 361, 92 N.W. at 742-743.

<sup>9</sup> 8 Wis. 2d 133, 98 N.W.2d 434 (1959).

## WISCONSIN STATUTORY LAW

There is statutory authority for three of the above bases of jurisdiction. First, where jurisdiction over the parties is obtained, either *in personam*, or *quasi in rem*, a Wisconsin court may determine custody.<sup>10</sup> This is so even where the action is for divorce or legal separation, and relief is denied.<sup>11</sup>

Second, a Wisconsin court may exercise jurisdiction to modify a Wisconsin custody judgment.

The court may from time to time afterwards, on the petition of either of the parties and upon notice to the family court commissioner, revise and alter such judgment concerning the care, custody, maintenance and education of any of the children and make a new judgment concerning the same as the circumstances of the parents and the benefit of the children shall require.<sup>12</sup>

Third, the physical presence of the child within the State confers jurisdiction.

... an independent action for custody may be commenced in any county of this state in which the child is present. The effect of any determination of a child's custody shall not be binding personally against a defendant parent or guardian unless the defendant has been made personally subject to the jurisdiction of the court in the action as provided in § 247.06.<sup>13</sup>

There is no statutory authority for jurisdiction based upon the domicile of the child within the state.

## UNIFORM CHILD CUSTODY JURISDICTION ACT

Under the Uniform Act jurisdiction based upon personal jurisdiction of the parties, presence of the child within the State or modification of a prior judgment is eliminated. Rather, jurisdiction is based on domicile, or, as phrased in the Act, the "home state" of the child. By limiting jurisdiction to the domicile of the child the Commission was attempting to eliminate a growing problem of our mobile society. Frequently, one or both of the parties in a marital dispute leaves the state. When a decree awards custody, the losing party, unwilling to accept the judgment of the court, may remove the child or fail to return him after a visit.

The commission found that this unfortunate state of affairs is facilitated rather than discouraged by the law, because the law provides no certainty as to whether a custody decree rendered in one state is entitled to recognition and enforcement in another, nor when one state may alter a custody decree of another state.

<sup>10</sup> WIS. STAT. §§ 247.03(e), 247.05(4), 247.24 (1967).

<sup>11</sup> WIS. STAT. § 247.28 (1967).

<sup>12</sup> WIS. STAT. § 247.25 (1967).

<sup>13</sup> WIS. STAT. § 247.05(4) (1967).

Since the United States Supreme Court has never settled the question of whether the full faith and credit clause of the Constitution applies to custody decrees, many states modify custody decrees of sister states almost at will.<sup>14</sup> The commissioners therefore concluded:

Generally speaking, there has been a tendency to over-emphasize the need for fluidity and modifiability of custody decrees at the expense of the equal (if not greater) need, from the standpoint of the child, for stability of custody decisions once made.<sup>15</sup>

As a result of such fluidity the courts of the various states often act in competition with each other, and a court of one state may award custody to one parent while another court awards custody simultaneously to the other parent. In such a situation litigants may be subject to contempt of court and criminal charges for taking a child in disobedience to the order of one state although in compliance with the decree of another.

The commission then made the following observation with regard to states such as Wisconsin, which provide a jurisdictional basis derived from the physical presence of the child:

In this confused legal situation the person who has possession of the child has an enormous tactical advantage. Physical presence of the child opens the doors of many courts to the petitioner and often assures him of a decision in his favor. It is not surprising then that custody claimants tend to take the law into their own hands, that they resort to self-help in the form of child stealing, kidnapping, or various other schemes to gain possession of the child. The irony is that persons who are good, law-abiding citizens are often driven into these tactics against their inclinations; and that lawyers who are reluctant to advise the use of maneuvers of doubtful legality may place their clients at a decided disadvantage.<sup>16</sup>

The commission cited extensive authority which, in recent years, has called for uniform legislation to bring about interstate stability in custody awards, and indicated that the commission had drawn heavily upon the work of these authors in cooperation with the American Bar Association.<sup>17</sup>

The Act is not reciprocal. It can be enacted by any state regardless of enactment by other states. Its effectiveness, however, depends upon the number of states which adopt it.

<sup>14</sup> *People ex rel Halvey v. Halvey*, 330 U.S. 610 (1947); cf. Comment, *Ford vs. Ford: Full Faith and Credit to Child Custody Decrees?* 73 YALE L. J. 134 (1963).

<sup>15</sup> Prefatory note to Uniform Child Custody Jurisdiction Act, p. 24.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795 (1964); Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A reply to Professor Currie and a Proposed Uniform Act*, 38 S. CAL. L. REV. 183 (1965); Ehrenzweig, *The Interstate Child and Uniform Legislation: A Plea for Extra-Litigious Proceedings*, 64 MICH. L. REV. 1 (1965).

## SUMMARY OF ACT

The Act limits custody jurisdiction to the state where the child has his home, or where there are other strong contacts with the child and his family. It provides easier recognition and enforcement of out-of-state custody decrees. Jurisdiction to modify decrees of other states is limited by giving a jurisdictional preference to the prior court under certain conditions. Access to a court may be denied a petitioner who has engaged in child snatching or similar practices. The Act opens up direct lines of communication between courts of different states to prevent jurisdictional conflict and encourage interstate judicial assistance in custody cases.

The Act places greater importance on the personal appearance before the court of non-residents who claim custody, and of the child himself, and provides for the payment of travel expenses for this purpose. The Act insures that the judge will receive necessary out-of-state information with the assistance of courts in other states.

The report of the National Conference of Commissioners on Uniform State Laws, setting forth the provisions of the Uniform Child Custody Jurisdiction Act, includes after each section extensive commentary as to the effects of its provisions.

## PROVISIONS OF ACT

(1) *Purposes of Act*

The purposes of the Act are set forth in detail because the Uniform Law breaks new ground not previously covered by legislation. The stated purposes are as follows:

1. To avoid jurisdictional competition and conflict between courts of different states, which result in shifting children from state to state.

2. To promote cooperation between the courts of other states, so that a custody decree will be rendered in whatever state can best decide the case in the interests of the child.

3. To assure that child custody litigation will take place in the state where the child and his family have the closest connection and where the best evidence concerning the child's care, protection, training, and personal relationships is most readily available.

Courts of the enacting state are to decline jurisdiction when the child and his family have a closer connection with another state.

4. To discourage continuing child custody controversy, for greater stability of home environment and family relationships.

5. To deter unilateral removals of children undertaken for custody purposes.

6. To minimize the relitigation of custody decisions.

7. To facilitate the enforcement of custody decrees in other states.

8. To expand the exchange of information between courts of the various states concerned with the same child.

9. To make the laws of those states which enact the Act uniform.

## (2) *Definitions*

Section 2 of the Act contains the definitions of the significant terms used in the Act. The most significant departure from existing law is in the definition of "custody proceeding". The definition has been expanded to include "proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings."<sup>18</sup> The comment indicates that this term also covers habeas corpus actions, guardianship proceedings, and any other proceeding to determine custody. The Act would lose much effectiveness if its provisions did not encompass all proceedings in which a custody determination could be made.

## (3) *Bases of Jurisdiction*

Section 3 states the basis upon which a court has jurisdiction either in the initial proceedings or in an action to modify a decree.

Subsection (a)(1) provides that a court may make such a determination if it is either the "home state" of the child at the time of the commencement of the proceedings, or the state has been the child's "home state" within six months before commencement of the proceedings, and the child is absent from the state but a parent or acting parent continues to reside in the state. "Home state" is defined by Section 2(5) as the state in which the child lived with a parent or acting parent for six consecutive months immediately preceding the action, or in a case where a child is less than six months old, the state in which he has lived from birth. Periods of temporary absence do not destroy the continuity of the six-month period.

Subsection (a)(2) provides for jurisdiction where it is in the best interests of the child that a court assume jurisdiction, because either the child and his parents or the child and at least one contestant have a significant connection with the state, and in addition, there is available in the state substantial evidence concerning the child's care, protection, training and personal relationships.

Subsection (a)(3) confers jurisdiction where the child is physically present in the state, but only if the child has been abandoned, or it is necessary in an emergency to protect the child because he is neglected, dependent, or subjected to mistreatment or abuse.

Subsection (a)(4) confers jurisdiction where no other state would have jurisdiction under the prerequisites of the first three sub-para-

<sup>18</sup> Section 2, Proposed Uniform Child Custody Jurisdiction Act.

graphs, or if another state has declined to exercise jurisdiction on the grounds that this state is the more appropriate forum to determine the custody of the child, and in addition, if this state decides that it is in the best interests of the child that a court of the state assume jurisdiction.

Subsections 3(b) and (c) provide that except for the exceptional circumstances set forth in the previous paragraphs, physical presence of the child in the state is not, in itself, sufficient to confer jurisdiction, and that physical presence of the child, while desirable, is not a prerequisite for jurisdiction. The comment to this section states:

In the first place, a court in the child's home state has jurisdiction, and secondly, if there is no home state or the child and his family have equal or stronger ties with another state, a court in that state has jurisdiction. If this alternative test produces concurrent jurisdiction in more than one state, the mechanisms provided in sections 6 and 7 are used to assure that only one state makes the custody decision.<sup>19</sup>

Extension of the home rule for a six-month period after the child's departure is to protect a parent who has been left by his spouse. This constitutes a substantial departure from existing laws which require either physical presence of the child, or personal jurisdiction over the departing parent as a condition for the exercise of the jurisdiction, thus forcing the person left behind to follow the departed person to another state.

Under circumstances where the "home state" test cannot be met, or if Section 3(2) comes into play as an alternative to that test, jurisdiction may exist in two states simultaneously. However, in these instances, jurisdiction may not be exercised in both states under Sections 6 and 7 of the Act.

In response to anticipated criticism that Section 3(a)(2) appears to be very broad, the comment notes:

The paragraph was phrased in general terms in order to be flexible enough to cover many fact situations too diverse to lend themselves to exact description. But its purpose is to limit jurisdiction rather than to proliferate it. The first clause of the paragraph is important: jurisdiction exists only if it is in the *child's* interest, not merely the interest or convenience of the feuding parties, to determine custody in a particular state. The interest of the child is served when the forum has optimum access to relevant evidence about the child and family. There must be maximum rather than minimum contact with the state. The submission of the parties to a forum, perhaps for purposes of divorce, is not sufficient without additional factors establishing closer ties with the state. Divorce jurisdiction does not necessarily include custody jurisdiction.<sup>20</sup>

<sup>19</sup> Comment, Section 3, Proposed Uniform Child Custody Jurisdiction Act.

<sup>20</sup> *Id.*



The comment further explains that physical presence has been retained as a jurisdictional fact only under exceptional circumstances, to reaffirm *parens patriae* jurisdiction, where a child is in need of immediate protection.

The comment also notes that although the section by its terms governs the jurisdiction to make an initial decree, as well as a modification decree, modification jurisdiction is subject to additional restrictions contained in Sections 8(b) and 14(a).

#### (4) *Notice*

Sections 4 and 5 set forth the notice requirements of the Act. These requirements are generally consistent with present methods of providing hearing notice.

#### (5) *Proceedings in Other States*

Sections 6 and 7 deal with the problem of simultaneous and competitive jurisdictions and provides an alternative to such conflicts by encouraging judicial restraint.

Section 6 provides that a court may not exercise its jurisdiction if at the time a petition is filed, a proceeding concerning the custody of the child is pending in a court of another state, unless such proceeding is stayed by that court because the other state is a more appropriate forum. This imposes a burden on courts to investigate the circumstances with respect to custody proceedings pending in other states, and determine which court is the most appropriate. Section 7 provides that as a general rule this principle of priority will determine which court will proceed with the action unless that court finds it is not a convenient forum.

The concept of inconvenient forum is well recognized in Wisconsin law and in fact the comment to section 7 notes that a portion of this section of the Act is derived from section 262.19(1) of the Wisconsin Statutes.

The concept of inconvenient forum is tailored in this section to the special needs of child custody cases. The criteria set forth in the statute relate less to the convenience of parties than to the fact that the child is the central figure.

These criteria include factors relating to which state is the child's most recent home, which state has the closest connection with the child, where the evidence is most readily available, and what agreement between the parties, if any, had been made.

If the court declines to exercise its jurisdiction it may either dismiss the case or stay the proceedings upon condition that proceedings be commenced in another jurisdiction. If the court finds it is clearly an inappropriate forum, it may require the party who commenced the pro-

ceedings to pay necessary travel and other expenses, including attorneys fees, incurred by the other parties or the witnesses. This provision is taken from section 262.20 of the Wisconsin Statutes.

(6) *Clean Hands Doctrine*

Section 8 provides that a court may decline to exercise jurisdiction where the petitioner has wrongfully taken a child from another state, has improperly removed the child from the physical custody of the person entitled to custody, has improperly retained the child after a visit or other temporary relinquishment of physical custody, or has violated any other provision of a custody decree of another state.

Further, a wrongful taking does not require a violation of a legal right. Even where no custody decree has been entered, if a child is abducted by a parent under circumstances which the court finds objectionable, the court in the exercise of its inherent equity powers need not permit that party access to its jurisdiction. The application of the "clean hands doctrine" as a punishment of the parent should not be at the expense of the well being of the child.

The comment also notes that it would constitute a violation of this section for a parent who has been given the right of custody, to remove a child from the state, thereby frustrating the other parent's exercise of visitation rights.

(7) *Information Required by the Court*

Sections 9 and 10 provide that the initial pleading in a custody action must advise the court of the child's present address, where he has lived for the past five years, and the names and present addresses of all persons with whom the child has lived during this period. Other information regarding the history of the child and other custody actions must also be provided. Based upon this information the court may require others to be made parties to the action.

(8) *Appearance of Parties and Child*

Under Section 11 of the Act the court may order any party to the proceedings who is in the state to appear personally before the court. If that party has custody of the child, the court may order the child to appear personally. If a party to the proceedings, however, is outside the state, with or without the child, the court may direct the party to appear personally upon penalty of an adverse decision. The section also provides that if it is just and proper the court may order the other party to pay travel expenses.

(9) *Binding Effect of Decree*

Section 12 provides that a decree rendered by a court with jurisdiction pursuant to Section 3 binds all parties who have either been served within the state, or notified in accordance with the notice provision, and

thus been given an opportunity to be heard. As to those parties, the custody decree is conclusive until modified pursuant to law.

There is no need for technical, personal jurisdiction required under the traditional theory that custody determinations are proceedings *in rem* which affect status. This section, however, can have no extra-territorial effect. In *May v. Anderson*<sup>21</sup> the United States Supreme Court held that full faith and credit need not be given a custody decree where the court did not have personal jurisdiction over the party against whom the decision was rendered. The *May* decision does not affect the internal validity of such a decree, but relates only to interstate recognition. The decision *permits* a recognition of a decree rendered with personal jurisdiction where due process requirements of notice were met, but does not *require* such recognition. Section 13, however, makes recognition and enforcement mandatory if the state in which the prior decree was rendered has adopted the act, or has statutory jurisdictional requirements similar to those of the act, or would have had jurisdiction under the facts of the case if the Uniform Act had been law in that state.

#### (10) *Modification and Enforcement of Foreign Decrees*

Section 14 provides that a court shall not modify a foreign decree unless it appears that the court which rendered the decree no longer has jurisdiction under prerequisites in accordance with the Uniform Act, or has declined to assume jurisdiction. The section further provides that in modifying a foreign decree, "new consideration" must be given to the transcript of the record and other documents of all previous proceedings. Modification jurisdiction turns upon the jurisdictional requirements of Section 3. Thus, adoption of the Uniform Act would change present Wisconsin law, which allows modification of any judgment entered in this state.<sup>22</sup>

The comment also indicates that the prior court would have jurisdiction to modify its judgment even if its original assumption of jurisdiction did not meet the standards of the Uniform Act, as long as it would have jurisdiction at the time of the petition for modification under the standards of the Act.

Section 15 provides that a foreign judgment will be enforced upon being filed with the clerk of the court. The clerk must treat the foreign decree in the same manner as a domestic decree. This provision in effect incorporates the simplified and speedy method of enforcement provided in the uniform enforcement of Foreign Judgments Act which has been adopted in Wisconsin as section 270.96 of the Wisconsin Statutes.

There is no Wisconsin statutory provision for the enforcement of a foreign custody decree at this time. However, the Act would be con-

<sup>21</sup> *May v. Anderson*, 345 U.S. 528 (1953).

<sup>22</sup> WIS. STAT. § 247.25 (1967).

sistent with existing methods of enforcing foreign judgments in non-custody cases. The comment to the section makes clear that the authority to enforce an out-of-state decree does not include the power to modify the decree. If modification is desired, the provisions of Section 14 must be complied with. The comment also makes clear that visitation rights may be enforced under this section.

Section 16 of the Act provides for a registry of foreign decrees, and Section 17 provides for the furnishing of certified copies of custody decrees.

#### (11) *Hearings in Other States*

Sections 18 through 22 of the Act relate to taking testimony or holding hearings in other states for use by the court in the forum state.

Under Section 18, depositions may be taken in other states. Under Section 19, a court may request the court of a foreign state to hold a hearing and require the attendance of witnesses. The comment indicates that these section would cover any kind of evidentiary procedure available under the law of the assisting state including custody investigations.

Section 20 provides that the state give assistance to the court of another state.

Section 21 relates to the preservation of records until the child reaches a specified minimum age, and Section 22 provides that a court must request records of another state upon taking jurisdiction of a case.

#### (12) *International Scope*

Section 23 provides that the general policies of the Act extend internationally and apply to decrees of foreign nations if reasonable notice and opportunity to be heard were given to all interested persons. The comment to this section indicates that the need to avoid jurisdictional conflicts and multiple litigation is just as strong when children are moved between countries as when they are moved between states.

### SUMMARY AND CONCLUSION

The Uniform Child Jurisdiction Act would change fundamentally the Wisconsin approach to jurisdiction in child custody cases. Jurisdiction would generally be predicated upon the residence of the child. Simultaneous or successive proceedings in different jurisdictions would be limited. Kidnapping would be discouraged. Modifications of custody decrees would be limited, and eliminated in all jurisdictions other than those which would have a jurisdictional basis for an initial procedure. New lines of communication would be opened between courts of various states.

The Act is well summarized in the prefatory statement of the commissioners:

"Underlying the entire Act is the idea that to avoid the jurisdictional conflicts and confusions which have done serious harm to innumerable children, a court in one state must assume major responsibility to determine who is to have custody of a particular child; that this court must reach out for the help of courts in other states in order to arrive at a fully informed judgment which transcends state lines and considers all claimants, residents and nonresidents, on an equal basis and from the standpoint of the welfare of the child. If this can be achieved, it will be less important *which* court exercises jurisdiction but that courts of the several states involved act in partnership to bring about the best possible solution for a child's future."<sup>24</sup>

The economics of a child custody fight are such that the Uniform Act would not affect a significant portion of the custody matters. Most parties concerned with the custody of children simply cannot afford custody litigation, particularly when this litigation is carried on across state lines.

Even though the number of children affected by the Act would be small, nonetheless the legislation does meet a need. The Wisconsin law which places emphasis upon personal jurisdiction over the parents, or the physical presence of the child, is obviously less oriented to the best interests of the child than is the Uniform Act, which predicates jurisdiction upon the home state of the child.

It is certainly inconsistent with any rudimentary concept of justice for the law to be an accomplice in creating the problems which the present system of child custody jurisdiction has been breeding. The Uniform Act is a needed progressive step forward in the improvement of the administration of justice.

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<sup>23</sup> Report of National Conference of Commissioners on Uniform State Laws, Uniform Child Custody Jurisdiction Act, p. 6.